The Indiana Prosecutor

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U.S. District Court Grants Injunction : Registered Sex offenders no longer on probation, parole, or under court supervision can not be required to provide access to their computers.

This year the legislature enacted SEA 258, which becomes effective July 1, 2008. Under this section, codified as IC 11-8-8-8(a)(7) , a registered sex offender must consent to a search of his home computer and any equipment which provides internet access. The offender must also purchase and pay for installation of software which monitors internet usage. Failure to sign a consent to search form could result in a criminal prosecution under IC 11-8-8 -17 (a)(3).

As written, IC 11-8-8-8(b) applies to ALL registered sex offenders, which may include offenders who have completed all portions of their sentence. The American Civil Liberties Union of Indiana , filed a class action suit on behalf of all those registrants who had completed their sentences and were no longer under any governmental supervision. Arguing that the Fourth Amendment rights of their clients were violated by forcing them to chose between maintaining privacy in their homes and criminal prosecution, the ICLU sought an injunction prohibiting prosecutors from enforcing IC 11-8-8-8(b).

On June 25, 2008, U.S. District Court Judge David Hamilton published his decision. Judge Hamilton opined "Section 8(b), however well intentioned, seeks to achieve law enforcement goals with means that violate the Fourth Amendment, at least as applied to the plaintiff class, offenders who have completed their criminal sentences and who are no longer under any form of parole, probation, or other court supervision."

Judge Hamilton enjoined all Prosecuting Attorneys in Indiana from applying IC 11-8-8-8(b) to Sex Offender registrants who have completed their sentences and who are no longer on parole, probation, or any other form of court supervision.

Inside this Issue

- *Defendant who is competent to stand trial, but not sufficiently mentally competent to represent himself, may be required to accept representation.*

Indiana v. Edwards, ____ U.S. Supreme Court _____ 6/19/08.

This case from Marion County affirms the trial court's decision to require Ahmad Edwards to proceed to trial while represented by appointed counsel. Ahmad Edwards was charged with shooting at a security guard after he stole shoes from a department store. Edward's actions wounded a bystander who eventually recovered. Edwards was charged with Attempted Murder, battery with a deadly weapon, criminal recklessness, and theft.

During the pendency of his case, Edwards was evaluated for competency on three different occasions. Edwards, who was diagnosed with schizophrenia, was found incompetent to stand trial and was sent to Logansport State Hospital for treatment. After several months he regained his competency and was returned to Marion County. Less than a year later his counsel filed a second motion again questioning Edwards' competency. After another psychiatric evaluation, Edwards was found to suffer from a mental illness but was competent to assist his attorney in his defense and therefore competent to stand trial.

Seven months after the second competency hearing, counsel for the defense filed a third competency petition. Edwards was evaluated a third time. This time a psychiatrist testified that due to his schizophrenic illness, Edwards was unable to cooperate with his attorney. Edwards was again found not competent to stand trial and was recommitted to Logansport State Hospital. After eight months of treatment, Edwards improved sufficiently to become competent to stand trial. He was returned to Marion County for trial.

> *"There are all kinds of **nuts** who could get **90 percent** on the bar exam."*
>
> *Justice Anthony Kennedy*
> *Oral arguments State of Indiana v. Ahmad Edwards*

Just before trial began, Edwards asked to represent himself and moved for a continuance. The trial court found that while Edwards was competent to stand trial, he did not maintain the competency necessary to represent himself at trial. Edward's motion to proceed pro se was denied as was his motion for continuance. The trial commenced with appointed counsel representing Edwards. He was convicted of criminal recklessness and theft, but the jury hung on the counts of attempted murder and battery.

The State chose to re-try Edwards on the more serious charges. Immediately before his second trial began, Edwards asked a second time to proceed *pro se*. The trial court again denied his request and he proceeded to trial with counsel. Edwards was convicted on the remaining counts. He appealed alleging his sixth amendment right to represent himself had been denied.

In its analysis, the United States Supreme Court found that while there were several cases that addressed mental competency and the right to proceed *pro se*, there was a lack of existing precedent directly on point. *Dusky v. United States*, 362 U.S. 402 (1960) established a two part test for determining competency. First, does the defendant have "a rational as well as factual understanding of the proceedings against him." Secondly, does "the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding." While Edwards met these standards, the Court questioned whether there should be a separate standard for self-representation.

The Court in *Faretta v. California*, 422 U.s. 806 (1975) found that under the Sixth and Fourteenth Amendment a defendant has a right to represent himself if the right to an attorney is voluntarily and intelligently waived. This right, however, is not absolute noting "there is no right to abuse the dignity of the courtroom."

In *Godinez v. Moran*, 509 U.S. 389 (1993), the Court addressed the issue of self representation and competency together. *Godinez* wished to plead guilty in opposition to his attorney's advice. He moved to proceed pro se. Without opposition from the State, *Godinez* was allowed to represent himself and plead guilty. The Court found that to plead guilty required a higher mental capability than was required to waive counsel. However, the decision to plead guilty was no more complicated than the decisions a defendant would make if he represented himself at trial. They held that a higher level of mental ca-

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pability was not required to waive counsel than was required to waive any other constitutional right.

While *Godinez* seemed to direct an answer in opposition to the Marion County Trial Court's decision, here the U.S. Supreme Court saw otherwise. Differentiating Edwards case from *Godinez,* the Court found *Godinez* only applies to the competency necessary to waive a right, not to the higher mental ability necessary to conduct a trial. As the Court demonstrated with an exhibit, Edwards was unable to complete a thought. His written motions contained a compilation of disjointed, meaningless legal phrases run together which did not identify any particular intent. The Court held that "the Constitution does not forbid states from insisting upon representation by counsel for those competent enough to stand trial but who suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves."

No rules were offered to guide courts in determining capacity to proceed *pro se.* Instead the court gave great discretion to the trial court to make that decision. They concluded that trial judges were in the best position to determine whether a defendant functions at a mental level that would allow them to conduct a defense at trial. "We consequently conclude that the Constitution permits judges to take realistic account of the particular defendant's mental capacities by asking whether a defendant who seeks to conduct his own defense at trial is mentally competent to do so." ⋆

♦ Sentencing

In a pair of decisions the Supreme Court further defined the "advisory" sentencing scheme by differentiating the use of prior convictions under the presumptive sentencing scheme with the newer advisory sentencing statute.

Pedraza v. State, 887 N.E.2d 77 (Ind. 5/22/08).

Pedraza was a traveling at a high rate of speed while intoxicated. He tragically struck a car full of passengers as they were leaving a wedding reception. Two persons were killed, including the father of the groom, while a third person sustained serious bodily injury. Pedraza was convicted of two counts of operating with a blood alcohol level greater than .15 grams of alcohol per 100 milliliters causing death as Class B felonies, as a habitual substance offender, and with one count of operating while intoxicated causing serious bodily injury with a prior conviction within five years, as a Class C Felony.

At sentencing the trial court noted defendant's prior criminal history, his need for rehabilitation, failure of prior attempts to rehabilitate him, and the nature of the circumstances as aggravating factors. The Court attached the Habitual Substance Offender (HSO) determination to the first count of operating while intoxicated causing death for an enhanced sentence of twenty-six years. Pedraza received an eighteen year sentence on the second count of operating while intoxicated causing death and eight years for operating while intoxicated causing serious bodily injury with a prior conviction. The Court ran all the counts consecutively for a total penalty of fifty-two years executed.

There were three issues the Court sought to clarify in its decision. First, whether a prior conviction could be used as both an aggravating factor and as the basis for an habitual offender enhancement. Second, whether a prior conviction could be used as both an aggravating sentencing factor and as a basis for an elevated criminal charge. Lastly, whether the same prior conviction could be used as a basis for an habitual offender finding and as an enhanced criminal charge where the habitual is run consecutively to the enhanced charge.

The core question is whether the defendant was penalized twice for the same prior offense in an impermissible "double enhancement" of his sentence. Case law applying the prior presumptive sentencing scheme was careful to avoid double enhancement of a sentence. The long standing rule was that a material element of an offense could not be used to aggravate a sentence. The same facts that were required to find a defendant guilty could not be used a second time to enhance the sentence as this was deemed an improper "double enhancement" of the sentence.

Chief Justice Shepard writing for the Court, used Pedraza and a companion case, *Sweatt v. State* to establish a distinction between case law based on the old presumptive sentencing scheme and the new generation of case law developed under the new advisory sentence statute. Case law decided under the presumptive sentencing scheme does not necessarily apply to the new advisory sentencing statute.

Under the presumptive scheme, convictions were enhanced by aggravating factors. Under the newer "advisory" scheme, courts no longer begin their sentence consideration with a presumptive sentence and use their discretion to raise or lower the sentence according to the aggravating factors. Now judges only make one discretionary call, what sentence should be given. While judges are required to support their decisions by citing relevant factors they have used in their determination, these factors are not used to "enhance" a sentence beyond the advisory sentence. Therefore, when a court cites a factor in the sentencing statement to show its reason for giving a sentence in the upper half of the sentencing range, this does not

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equate to giving an "enhanced" sentence. It is therefore permissible for a court to cite an element of the offense when providing its reason for a harsher sentence. It is equally acceptable to use a prior felony conviction as a sentence enhancement and as a reason for giving a longer sentence, as the Trial Court did in this case.

In its Pedraza ruling the Court reached the following conclusions:

Where a trial court uses the same criminal history as an aggravator and as support for an habitual offender enhancement, the finding does not constitute an impermissible double enhancement of the offender's sentence.

A material element that establishes a crime may be used as a reason to give a greater sentence; however, if that were the only reason given for a longer sentence, the sentence might be revised on appeal.

Where enhancements of separate counts are based on the same prior convictions, ordering sentences to run consecutive is improper double enhancement. This finding was explored more thoroughly in the companion case, *Sweatt v. State.* ⋆

- *Sweatt v. State,* _____N.E.2d_____(Ind. 5/22/08).

Sweatt was convicted of burglary and possession of a handgun by a serious violent felon (SVF). He was also found to be an habitual offender. To prove the SVF count, the State relied on a 1994 rape conviction. This same rape conviction was used to establish the defendant's status as an habitual offender.

While it was proper to convict Sweatt of both the SVF and the habitual offender count, the court erred when it ran the counts consecutively.

The Trial Court enhanced the burglary conviction with the habitual offender determination and sentenced him to fifty years. Sweatt received an additional twenty years on the SVF count. The Court then ran the counts concurrent for a total sentence of seventy years. On Appeal, Sweatt argued that the court erred in allowing the same prior to be used for an SVF charge and for an habitual offender sentence enhancement.

Can a felony conviction serve as the basis for an SVF charge and as an underlying felony for an habitual offender enhancement? It can if the habitual is attached to some other count. However, if the habitual is used to enhance the SVF count it is an improper double enhancement and must be corrected.

The bigger question tackled by the court, if a court can not apply an habitual enhancement to a SVF count which is based on the same prior conviction, how does the consecutive sentencing scheme affect the sentence? On this issue the Court differed. In a 3-2 decision the Court found that "in a case where separate counts are enhanced based on the same prior felony conviction, ordering the sentences to run consecutively has the same effect as if the enhancements both applied to the same count….if the trial court orders the sentences to run concurrently, the enhancements, though duplicative in name, operate just once to increase the defendant's term of imprisonment."

While it was proper to convict Sweatt of both the SVF and the habitual offender count, the court erred when it ran the counts consecutively. While two justices disagreed, the majority held that by running the counts end to end, the defendant was penalized twice for the same prior conviction. If the trial court runs the counts concurrently the total sentence is only enhanced one time. The case was remanded for sentence reconsideration. ⋆

- *Plea agreements: Defendant can waive the right to appeal a discretionary sentencing decision.*

Creech v. State, 887 N.E.2d 73 (Ind. 5/21/08).

Timothy Creech was charged with one count of Class C felony child molest. He entered into a written plea agreement which capped the executed time of six years and left the remainder of the sentence to the discretion of the court. Contained within the agreement was a provision that waived the defendant's right to appeal the sentence.

On appeal Creech argued the waiver provision was unenforceable generally. Further the Court did not enter into a dialogue with the defendant that established he was knowingly and voluntarily waiving his right to appeal the sentence. In addition to the lack of colloquy, to conclude the hearing, the trial court advised Creech he had the right to appeal his sentence and noted the advisement in the minutes.

Can a defendant knowingly and voluntarily waive his right to appellate review of his sentence? Yes. The Court found that provisions to waive appeal of a sentence offer both parties a benefit. Provided the defendant knowingly and voluntarily enters into the plea agreement, a provision that waives a right to appeal the sentence may be enforced.

Creech's written plea agreement contained the following provision:

I understand that I have a right to appeal my sen-

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tence if there is an open plea. An open plea is an agreement which leaves my sentence to the Judge's discretion. I hereby waive my right to appeal my sentence so long as the Judge sentences me within the terms of my plea agreement.

Noting the Seventh Circuit has consistently upheld enforcement of written waivers, the Court found that the defendant had voluntarily waived his right to appeal his sentence. Citing *United States v. Agee*, 83 F.3d 882 (7th Cir. 1996), the Court found "a specific dialogue with the judge is not a necessary prerequisite to a valid waiver of appeal, if there is other evidence in the record demonstrating a knowing and voluntary waiver." While the trial judge may have confused Creech by notifying him of the standard right to appeal, the timing of the remarks did not influence the voluntariness of the waiver. The Court found Creech voluntarily waived his right to appeal his sentence.

The Court reaffirmed that a defendant can not waive his right to post-conviction relief and such provisions in a plea agreement are unenforceable. A defendant is not prohibited from establishing deceit or duress to enter a plea agreement through a Post-Conviction Relief petition. ⋆

♦ *Indiana Supreme Court rules on Karl Jackson Habitual Traffic Violator Case*

On May 13, 2008, the Indiana Supreme Court issued a long awaited opinion in the Karl Jackson case, a D felony Operating a Vehicle After Being Adjudged A Habitual Traffic Violator case, which had been a cause for great concern to prosecutors and thereby provided much needed guidance for lower courts for future similar cases. In a 3-2 opinion written by Justice Dickson, the Indiana Supreme Court held that "a conviction for Operating a Vehicle After Being Adjudged a Habitual Traffic Violator, a class D Felony, in violation of Ind. Code 9-30-10-16 (a)(1), does not require proof that the person operated a vehicle with knowledge that the person's driving privileges were suspended *because* of a habitual traffic violator determination; rather, such a conviction requires only proof that the person operated a vehicle with knowledge that the person's driving privileges were suspended, regardless of the reason."

Karl Jackson, the defendant, was stopped in Hamilton County by a Carmel police officer and asked to produce his vehicle registration and driver's license. He immediately admitted to the police officer that his driver's license was suspended. At trial, the defendant testified that at the time his Notice of HTV Determination and 10 Year Suspension was mailed by the Bureau of Motor Vehicles he did not live at the last known address on file with the Bureau of Motor Vehicles and that he had not notified the Bureau of Motor Vehicles of his change in address. The defendant was acquitted by the trial court in a bench trial. In *State v. Karl Jackson,* 864 N.E.2d 431 (Ind. Ct. App. 2007), the Indiana Court of Appeals held that the State must prove that the defendant operated a vehicle with knowledge that his license was suspended because of his Habitual Traffic Violator status in order to convict him of the D felony offense of Operating a Vehicle After Being Adjudged HTV pursuant to I.C. 9-30-10-16(a)(1).

Proof of *mens rea*, the defendant's "knowledge" of his suspension and notice of the suspension to defendant, is always an issue in these cases as the act of operating a vehicle and the fact of the HTV determination and license suspension are more easily proven. An earlier version of the HTV statute was silent on the issue whether proof to obtain a conviction required notice or "knowledge" of the suspension. However, the Indiana Supreme Court judicially supplied the mens rea element of the D felony Driving While Suspended After HTV determination in 1999 in *Stewart v. State,* 721 N.E.2d 876 (Ind. 1999), a case involving this issue of requisite knowledge of defendant decided under the old HTV statute. There, the Indiana Supreme Court held that proof by the State that defendant "knew or should have known" that his license was suspended as shown by proof of mailing of a notice of suspension to defendant by the Bureau of Motor Vehicles at his last address known to the Bureau constituted "constructive knowledge" sufficient to sustain a conviction for the felony conviction of driving while suspended as an HTV. Although the Legislature amended the Habitual Traffic Violator statute in 2002 to include a *mens rea* by adding the language "and the person knows that his driving privileges are suspended", the meaning of this "knowledge" element of the D felony HTV offense and the doctrine of "constructive knowledge" as interpreted by the Indiana Supreme Court in *Stewart* has remained as the definitive authority on the issue.

In affirming the trial court acquittal of the defendant in *State v. Jackson,* the Court of Appeals imposed a strict *mens rea* requirement of proof of actual knowledge of license suspension specifically because of Habitual Traffic Violator Status upon the State in order to convict the defendant for the D felony Operating a Vehicle While HTV under I.C. 9-30-10-16 contrary to the Indiana Supreme Court's decision in the *Stewart* case. This Court of Appeals decision caused great concern among prosecutors because it overturned the Indiana Supreme Court's ruling in *Stewart* that the State need only prove the defendant "knew or should have known his license was suspended" and eliminated the doctrine of "constructive knowledge" making proof of notice or knowledge of license suspension by the defendant in future cases of the Operating a Vehicle After Being Adjudged Habitual Traffic Violator offense under I.C. 9-30-10-16 extremely difficult. Successful prosecution and conviction for this felony offense, and the imposition of the accompanying lifetime suspension of driver's license upon conviction became impossible. Prosecutors were forced to scramble and to become very creative in proving a defendant's knowledge or notice of his license suspension upon HTV determination

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since a defendant could apparently overcome the rebuttable presumption of notice established by proof of mailing of notice by the Bureau to defendant's last known address with the Bureau of Motor Vehicles found in the statute at I.C. 9-30-10-16(b) by simply denying that they lived at the Bureau's last known address at the time the notice was sent.

Because the Court of Appeals holding in *Jackson* was contrary to law and was contrary to the Indiana Supreme Court decision on the same issue in *Stewart,* the State sought and was granted transfer to the Indiana Supreme Court. The central issue in *Jackson* was whether the State had sufficiently proven that the defendant, Jackson, knew his driving privileges had been suspended within the meaning of I.C. 9-30-10-16. A secondary issue was whether defendant had overcome the rebuttable presumption that a person "knows" that his license is suspended upon proof that the Bureau of Motor Vehicles sent proper notice of suspension to the person at the last known address in the Bureau's records found at I.C. 9-30-10-16(b).

After a brief analysis of the previous HTV statute and its ruling in the *Stewart* case interpreting the prior statute, the Indiana Supreme Court reviewed the current language of the Operating After Being Adjudged a Habitual Traffic Offender D felony offense with particular focus on the "knows that the person's driving privileges are suspended" language found at I.C. 9-30-10-16(a)(1) and found that the plain language of the statute "requires knowledge only that the driving privileges are suspend, and not that they are suspended because of an HTV determination". The Indiana Supreme Court then briefly discussed the applicability rebuttable presumption of knowledge of suspension in I.C. 9-30-10-16(b) that arises upon proof of mailing of proper notice of suspension to a defendant by the Bureau of Motor Vehicles to the last known address on record with the Bureau. Without addressing the "rebuttable presumption" language and the issue whether the presumption is "permissive" or "mandatory", the Indiana Supreme Court noted that the State is not required to establish the rebuttable presumption of knowledge where there is independent proof that a person is operating a vehicle with actual knowledge of license suspension. According to the Court, this case doe not require application of the rebuttable presumption because the State had direct proof of the defendant's knowledge in the form of his admission to police that his license was suspended. Therefore, it was unnecessary for the State to rely on the rebuttable presumption provision to establish the violation and obtain the conviction.

The Indiana Supreme Court's opinion in *State v. Jackson* is a significant victory and a relief for prosecutors. The decision not only solves the temporary problems of proof and conviction for the D felony Operating While HTV offense that were created by the Court of Appeals in its earlier decision in *Jackson* but also provides a clear statement of the law to guide prosecutors in prosecuting similar cases in the future. To obtain a conviction for the D felony Operating a Vehicle After Being Adjudged a Habitual Traffic Violator, the State must prove the following elements: 1) the defendant operated a vehicle; 2) the defendant was suspended or adjudicated HTV; and 3) the defendant knows that his license is suspended. Proof of actual knowledge of the defendant of the suspension and the reason for the suspension, the HTV determination, is not required by the Indiana Supreme Court. It is enough to satisfy the *mens rea* element to show that the defendant "knew or should have known" his license was suspended, and "constructive knowledge" will be sufficient proof to convict for the D felony offense. In the absence of direct, independent proof of the defendant's knowledge of suspension, the State may resort to the rebuttable presumption found in I.C. 9-30-10-16(b) and prove the defendant's knowledge of his suspension by proof of mailing of proper notice to the defendant by the Bureau of Motor Vehicles to the defendant's last known address on file with the Bureau of Motor Vehicles.

Prosecutors should continue to be diligent in their trial preparation for the D felony Operating After Being Adjudged HTV cases particularly on the "knowledge" element of the offense. Often, this preparation begins well before a defendant is determined to be HTV and subsequently operates a vehicle, upon his conviction for the offense that will make him HTV eligible. Certified copies of a plea agreements that include notice to a defendant that he will become HTV upon conviction and that he is required by statute and perhaps as a term of probation to report all changes of address to the Bureau of Motor Vehicles and a transcript of the guilty plea hearing including an advisement by the Court at that defendant's license will be suspended due to HTV status provide excellent evidence that defendant "knew" that his license was suspended at a subsequent trial on the D felony offense. Certified BMV record and "packets" are always definitive proof of the HTV determination and suspension and of notice to defendant where they show mailing of notice to defendant at his last known address of record with the BMV because they raise the rebuttable presumption of "knowledge". Always obtain those records and carefully review them well before trial and use them to prove the element of notice. Although these cases can be technically difficult to prove, convictions for the D felony Operating While HTV are possible with appropriate preparation now that the Indiana Supreme Court has affirmatively stated in *Jackson* that the State need not prove actual notice to the defendant that his license was suspended because of his HTV status but need only prove that the defendant knew his license was suspended at the time he operated a vehicle. ⋆

♦ *Comments placed on a private MySpace page do not constitute Harassment when there is no reason to believe the victim would have access to those comments.*

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A.B. v. State, 885 N.E.2d 1223 (Ind. 5/13/08).

A.B. was a disgruntled middle school student. Dissatisfied with her former high school principal, she posted comments about him on two separate MySpace pages. The first comments were posted on a phony my space page which was created to appear as if it belonged to the Middle School Principal, Mr. Gobert. The student who created the false page, limited access to the account to twenty-six designated "friends." A.B. posted vulgar comments on the phony page including the phrase "die…. gobert …..die."

The second MySpace page was owned by A.B. This page was established as a publically accessible cite which did not limit access to anyone. On this page A.B. posted comments that expressed her anger and criticism of Mr. Gobert. Remarks attributable to A.B. included a description of the disciplinary action served on the student who created the phony page as well as the comment "GMS (Green Castle Middle School) is full of over reacting idiots!"

A.B. was charged in Juvenile court with multiple counts of Harassment as Class B Misdemeanors. The Court of Appeals found that A.B.'s comments constituted political speech and were therefore protected under the Constitution. The Supreme Court granted transfer .

The crime of Harassment is defined in part as follows:

IC 35-45-1-2. (a) A person who, with intent to harass, annoy, or alarm another person but with no intent of legitimate communication:
…
(4) uses a computer network (as defined in IC 35-43-2-3(a) or other form of electronic communication to:
(A) communicate with a person; or
(B) transmit an obscene message or in decent or profane words to a person;
commits harassment, a Class B misdemeanor.

Justice Dickson writing for the court noted, "For a person to commit an act with the intent to harass, annoy, or alarm another person, common sense informs that the person must have a subjective expectation that the offending conduct will likely come to the attention of the person targeted for the harassment, annoyance, or alarm." The Court concluded that before a student could be guilty of harassment they must have a reason to believe the victim would receive the harassing information.

A.B. made her threatening comments on the private or closed phony MySpace page. At the time she typed the words A.B. had no reason to believe Mr. Gobert would read the remarks. Until a student provided Mr. Gobert access to the page, the principal was unable to read the threats. The court found there was no evidence that A.B. intended that her postings be read by the victim, Mr. Gobert. Instead they found it was more consistent to believe this was just a fourteen-year old student attempting to garner approval from her friends and not an attempt to harass the principal.

Unlike the private MySpace page the comments posted on the public page would have been available to Mr. Gobert. However, to constitute harassment, remarks must be made "with no intent of legitimate communication." Here A.B. was posting her discontent with the administration's decision to punish another student. The Court held A.B.'s comments on her public page were intended to express her criticism of the school and therefore were intended for legitimate communication. They did not satisfy the elements of harassment. ⋆

♦ *Sexually violent predator status can not be determined heard for the first time during a probation revocation proceeding*

Jones v. State, 885 N.E.2d 1286 (Ind. 5/15/08).

Alan Jones molested a thirteen-year-old girl in 2002. He plead guilty to a twenty-year sentence with ten years suspended and on probation. As a term of probation, he was ordered to register for ten years on the Sex Offender Registry. At the time of sentencing the statute for a sexual violent offender finding required the court to receive testimony from qualified experts and to make a specific determination that the defendant was a sexually violent predator. Jones challenged the Trial Court's authority to make a sexually violent predator determination after his original sentence determination and argued under Indiana Appellate Rule 7(B) that the order to serve the remaining ten years was inappropriate.

In 2006, the legislature amended the sexually violent predator statute, I.C. 35-38-1-7.5, to allow for an automatic determination of sexually violent predator status for offenders who commit certain offenses.

After serving his executed sentence, Jones was released to probation. While on probation Jones committed several violations including having sexual contact with his original victim. During a probation revocation hearing the trial court found that defendant was a sexually violent predator and ordered him to register for life on the sex and violent offender registry.

The Supreme Court examined I.C. 35-38-1-7.5 (c) which states, "At the *sentencing* hearing, the court shall determine whether the person is a sexually violent predator." A probation revocation determination is not a separate sentencing action; it is merely a reinstatement of the original sentence. The trial court had no authority under the statute to make a sexually violent predator determination at the probation revocation hearing.

Regarding the propriety of defendant's revocation determination, the Court found Appellate Rule 7(B) is not available for review of a probation revocation determination. Such determinations may be reviewed only for abuse of discretion. The trial court did not abuse its discretion in ordering defendant to serve the rest of his sentence in confinement. ⋆